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JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

NO. 657

KANSAS CITY SOUTHERN RAILWAY CO.,

Petitioner

—Against—

PAUL JOHNSTON

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT AND OPINION OF THE SUPREME COURT OF THE STATE OF OKLAHOMA

CLYDE J. WATTS
219 Couch Drive
Oklahoma City, Oklahoma

King Law Brief COMMERCE EXCHANGE BLDG., OKLAHOMA CITY — CE 8-2969

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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oklahoma which was entered in this action on the 29th day of May, 1967, with said Court denying this petitioner's Petition for Rehearing on June 27, 1967.

CITATIONS TO OPINION BELOW

The unreported Opinion of the Oklahoma Supreme Court dated May 29, 1967, sustaining Paul Johnston's judgment of the trial court of LeFlore County of the State of Oklahoma, are printed in Appendix B, pages 42 to 46.

Petition for Rehearing of this petitioner denied by the Supreme Court of Oklahoma on June 27, 1967, are printed in Appendix B, pages 47 to 48.

The Second Petition for Rehearing, Application for Leave to File Second Petition for Rehearing, which was denied July 18, 1967, are printed in Appendix B, pages 49 to 50.

Petitioner's Notice of Petition for Centiorari and Appeal to the Supreme Court of the United States and StayBond on Appeal with Order of the Oklahoma Supreme Court dated August 16, 1967, granting Petitioner's stay of spreading mandate and ordering the Clerk of the Court to prepare a transcript for certiorari and transmission to the Clerk of the Supreme Court of the United States is printed in Appendix B, pages 51 to 53.

JURISDICTION

This Petition for Writ of Certiorari is taken from the Order of the Supreme Court of the State of Oklahoma denying petitioner for a rehearing dated June 27, 1967.

The jurisdiction of this Court is invoked under 28 USC, Sec. 1257 and Sec. 2101(c), (f); Amendment XIV, Sec. 1, Constitution, USC, Amendment XIV, page 288, Amendment VII to the Constitution, Constitutional Amendments USC, page 134; Rules of the Supreme Court of the United States, Part V, Rule 19, paragraph 1, 1(a), 1(b), printed in Appendix A, pages 3-A to 5-A.

QUESTIONS PRESENTED

1. Whether the judgment below requires summary reversal on the ground that such judgment below deprived petitioner of due processes of the right to trial by jury in questions involving the Federal Employers Liability Act.

2. Whether the judgment below deprived petitioner of the guarantees afforded by the Seventh Amendment and Fourteenth Amendment of the Constitution of the United States.

3. Whether the State Court has decided a Federal question of substance in such a way not in accord with applicable decisions of this Court and rendered a decision in conflict with the decision of this Court.

4. Where the Oklahoma State Constitution requires a submission of issues to a jury on the question of contributory negligence, consistent with the Federal law of the question of contributory negligence under Federal Employers Liability Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Involved herein are Amendments VII and XIV to the United States Constitution;
2. Title 45 USC, Sec. 51
3. Title 45 USC, Sec. 53
4. Title 45 USC, Chapter 1, paragraph 2 (Safety Appliance, etc.—Automatic couplers)
5. Article 23, par. 6, Constitution of the State of Oklahoma.

The texts of the above are reprinted in Appendix A, pp 1 to 6.

STATEMENT OF THE CASE

Paul Johnston, plaintiff in the trial court of LeFlore County, State of Oklahoma, brought his action against the Kansas City Southern Railway Company, under the provisions of Title 45 USCA, Sec. 2, the Safety Appliance Act, Automatic Couplers, a part of the Federal Employers Liability Act. His action was predicated upon the "absolute duty" that the cars would remain coupled until set free by some purposeful act of control. The evidence shows while en route between the cities of DeQueen, Arkansas, and Heavener, Oklahoma, and when negotiating a place known as "Rich Mountain," Arkansas area, and while on the down hill side of the mount-

ain, the train became separated in movement approximately thirty cars ahead of the caboose causing a running gap between two sections of the train while descending the mountain. The effect of the separation between two parts of the train caused the forward half of the train to go into emergency application of brakes by automatic control, causing the rear section of the separated train to run into the forward half, thereby causing injuries to Johnston, a conductor riding in the caboose at the time.

While plaintiff Johnston sought to bring his action strictly under the Safety Appliance Act he nevertheless pled and sought to prove excessive length of train, (R. 4, 66, 67), excessive tonnage in load, (R. 4, 73), and a previous failure of the couplers, (R. 4, 5), to infer negligence or other breaches of duty of the railroad under the Federal Employers Liability Act in general, not connected with Safety Appliance Act. Proof was submitted by plaintiff in support of his Petition in all instances.

Defendant railroad sought to plead in its Answer that the Safety Appliance Act did not specifically apply to the incident while the train was in transit, inasmuch as there was no requirement that plaintiff Johnston be in or about the car or couplers or ends of the car at the time and place, and that the accident did not arise out of any switching operation; and to deny any negligence in the operation of the train and that the accident occurred by reason of an unavoidable accident in the

parting of the train while descending Rich Mountain and that a sudden emergency existed when it was discovered the train had parted and that the plaintiff himself was contributorily negligent in failing to take proper precautions upon being informed of the separation of the train in time to do something for his own protection and safety where he was riding in the caboose of said train having been advised of the separation by radio communications. (R. 70)

The trial court ordered stricken the defense of the railroad to contributory negligence of the plaintiff, the unavoidable accident, and the sudden emergency plea, and the denial of the railroad that they were not negligent; based upon briefs submitted to the Court, and finding that under the action brought simply under the Safety Appliance Act that negligence was not a factor, contributory negligence would not lie and other defenses be stricken. (R. 24, 29).

In the trial of the case evidence was submitted by both plaintiff's witnesses and defense witnesses that there are many probable causes for a train to separate in movement and in transit other than a defective coupler (Append "C"). Evidence was submitted that plaintiff had overheard radio communication that a separation in the train existed and to be prepared for an emergency stop, notwithstanding the evidence submitted by both parties, the court nevertheless rendered summary judgment for plaintiff on the question of liability of the railroad judging the facts under Safety Appliance Act only

and submitted the cause to the jury for the amount of damages only; thereby depriving railroad company of any consideration by the jury on defenses under the Federal Employers Liability Act or diminution of damages by reason of any contributory negligence of plaintiff Johnston in failing to protect himself or take adequate precautions for the emergency stop; and that the couplers were not defective or would not couple on impact and remained uncoupled without the necessity of men going between the ends of cars. Sufficient evidence was introduced as to many other factors causing similar separations not involving "defective couplers." (Footnote No. 1 and Append. "C").

Evidence was abundantly clear that there was no switching operations involved, that the injured plaintiff was in the caboose some thirty car lengths away from the separation of the train, riding in the caboose seats. That both the plaintiff Johnston and another railroad employee had made a walking inspection (R. 65) of the train and its couplers on the upgrade side of Rich Mountain some minutes before they caught the caboose for the downgrade side of Rich Mountain wherein the separation occurred.

Both the trial court and the State Supreme Court of Oklahoma by the decision and ruling in the questions involved have made law effecting substantially the rights of the railroad industry by this decision that any separation of a train in

transit by any reason whatsoever becomes an obligatory duty to pay damages therefrom leaving only the amount of compensation for any jury question. (R. 179.)

REASONS FOR GRANTING THE WRIT

1) This Court has held unanimously that only by a uniform rule to the necessary amount of evidence may litigants receive similar treatment in all States under the Employers Liability Act.

In *Brady vs. Southern Railroad Co.*, 64 S. Ct., 232, 320 U. S. 476 (1943)

"There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In employers liability cases, this question *must* be determined by this court finally. Through the supremacy clause of the Constitution, Article VI, we are charged with assuring the Act's authority in State Courts.

Only a uniform Federal rule as to the necessary amount of evidence may litigants under the Federal Act receive similar treatment in all States."

"—It is true that this Court has held that a state need not provide in FELA cases any trial by jury according to the requirements of the Seventh Amendment.—but when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. The weight of the evidence under the Employers Liability Act must be more than a scintilla before the cause may be properly left to the discretion of the trier of the fact—in this case, the jury."

Thus, this Court has held in effect that when a state's jury system requires it to submit the issues to the jury that it will be upheld. We, therefore, look to the Oklahoma, the state law, applying in all areas of contributory negligence.

Oklahoma's Constitution is unique in form, but requires the submission of all cases where this defense has been raised to the jury. (Appendix A, p. 2-A.

Oklahoma law is abundant that where defendant has pleaded contributory negligence and made sufficient showing to place this question in issue, that the Constitution of the State of Oklahoma requires it to be left to the jury. It has also been held that this section under the Oklahoma Constitution is not violative of the Constitution of the United States, Amendment XIV (*Chicago, Rock Island & Pacific RR Co. vs. Cole,* 40 S. Ct. 68 251 U. S. 54, 64 L. ed. 133).

2) The Oklahoma courts erred to the substantial prejudice to this defendant of permitting plaintiff to plead and then introduce evidence to prove issues involving the ordinary case under the Federal Employers Liability Act, while plaintiff seeks to restrict the defense to only that applicable under the Safety Appliance Act; by alleging "this suit and cause of action is brought pursuant to the Safety Appliance Act, Title 45 USCA, Sec. 2; to-wit; "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving

interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car." (R. 3). Nevertheless, relying upon such, plaintiff pleads further "defendant's train at the above mentioned time and place consisted of 124 cars securely coupled, and loaded with 6,919 tons of ore and other merchandise being transported in interstate traffic." (R. 4). "A knuckle broke on car No. DSDX-5040-XB-KC, which car was about 27 cars from the engine. This knuckle was subsequently repaired and, after various switching movements, the cars in defendant's train were again securely coupled." (R. 5) And, "defendant's engineers started the train down Rich Mountain and reached a speed of approximately 40-45 miles per hour—." (R. 5). These elements of pleadings and later of proof submitted to substantiate the pleadings go beyond that which plaintiff seeks to rely upon under the Safety Appliance Act, and in fact go to the question of negligence under the Federal Employers Liability Act in general.

The trial court clearly shows that they considered only the requirements to be met under the Safety Appliance Act, (R. 176) when motion by plaintiff's attorney asked for a directed verdict by the following language. "For the reason that under the Safety Appliance Act the defendant railroad company is required to equip its cars with couplers which remain coupled while the train is moving and that no amount of

care on the part of the defendant railroad can excuse it from this obligation, and under the evidence as thus far presented the railroad is clearly responsible." The record (R. 176) then clearly shows that argument of counsel continued in chambers nevertheless the Court sustained the motion as presented under the Safety Appliance Act.

3) If this case is allowed to sand, it in effect operates to relieve jury determination of issues in any Safety Appliance Act case and the Court would in all cases be acting as a "referee". The submission of the cause to the jury for damages only, circumvents the entire principles of injuries under the Federal Employers Liability Act. This is a case which involves a serious question of construction of a statute of nationwide importance. Even Mr. Justice Frankfurter, who has consistently for a decade refrained from participating in the substantive disposition of cases arising under the Federal Employers Liability Act, and the Jones Act, brought before this Court on Writ of Certiorari, nevertheless agreed that a like case with similar questions for determination was properly brought before this Court on a Writ of Certiorari in the case of Kernan vs. American Dredging Co., 78 S. Ct. 394, 355 US 426, (1958).

> "This case is different in kind from those in which I have felt it my duty to abstain from consideration on the merits. This is a case which involves a serious question of

> construction of a statute of nationwide importance. Such questions of construction are among the most important issues for final determination by this Court. I therefore reach the merits, and on the merits I join the opinion of Mr. Justice HARLAN."

Mr. Justice Frankfurter, in a dissenting opinion to the *Rogers vs. Missouri, Pacific RR Co.*, 352 US 500, 77 S. Ct. 443, with his dissent reported under 352 US 518, 77 S. Ct. 459, on page 532, and page 464:

> "Of course, cases raising questions that are not evidentiary, questions that fairly involve the construction or scope of the statute are appropriate for review here."
> "—But the ordinary negligent case under the Federal Employers Liability Act does not satisfy the criteria that define the 'special and important reasons' when a Writ of Certiorari will be granted,—."

4. We submit that this question as to whether question of facts are eliminated entirely in the Safety Appliance Act claims, is one fairly involving the construction and scope of the statute and not one of evidentiary questions primarily. Such is the question we submit by this Writ of Certiorari that while evidence was a factor in the trial of the case to the Petition of the plaintiff, nevertheless the greater question is whether or not Safety Appliance Act claims are defensible and whether a failure of an appliance may be submitted to the jury for determination as suggested in *O'Donnell vs. Elgin, J & E Ry. Co.*, 338 US 384, 70 S. Ct. 200, on page 206, footnote No. 7,

> "We do *not* say that a railroad may never effectively defend under the Act by showing that an adequate coupler failed to hold because it was broken or released through intervening and independent causes other than its inadequacy or defectiveness such, for example, as the work of a saboteur. And we do not find it necessary to consider a situation where an adequate coupler failed to hold because it was improperly set, since such facts are not before us."

This Court then in the majority opinion had agreed that a railroad may defend for such independent or intervening causes; along with a "saboteur"; animals may strike a coupler, debris strike a coupler, or other sources strike a coupler causing its uncoupling.* Thus, state the majority in the O'Donnell case. But looking to the dissenters, Mr. Justice Burton and Mr. Justice Reed, wherein they state:

> "We do not agree that the Safety Appliance Act contains a mandatory requirement that cars used in *moving* interstate traffic must be equipped with couplers that 'will remain coupled until set free by some purposeful act of

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Foot Note 1—(R- 84) by II "I don't know what caused it."
(R- 86) "Draw bar they break, they pull them out."
(R- 93) "busted knuckles."
(R-101) hose breaking hitting the pin.
(R-101) Something falling off the car hitting pin.
(R-101) Something flying up from the railroad bed.
(R-107) Long trains slack action likely to uncouple itself.
(R-108) Animals hitting them cause uncoupling.
(R-141) Many factors do make them come up.
(R-166) Something could hit pin lifter handle.
(R-166) Rough track.

> control'. Congress might have so legislated, as they did in the section which required cars to be equipped with 'efficient hand brakes';—however, it did not do so."

We do note with considerable satisfaction, however, that all Justices nevertheless in that opinion did rightfully consider this a "jury question."

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted, and the judgment below summarily reversed, with directions that this case be tried on its merits and submitted to the jury on the questions properly presented.

Respectfully Submitted

CLYDE J. WATTS
219 Couch Drive
Oklahoma City, Oklahoma